Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

LAWRENCE MARCELL WILLIAMS
and VASILIOS DOURDOUMIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit lacked jurisdiction to entertain and rule upon portions of the District Court decision that the Government did not appeal.

2. Whether the Government waived its consensual police-citizen encounter argument by failing to raise the same in its brief to the Fourth Circuit.

3. Whether the Fourth Circuit improperly disregarded the District Court's findings of fact demonstrating that the encounter between the arresting officer and the Appellees constituted an investigatory stop invoking Fourth Amendment rights and analysis under this Court's *Terry* decision.

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OPINIONS BELOW

The June 5, 2000, Opinion of the Fourth Circuit Court of Appeals, whose judgment is herein is sought to be reviewed, is unpublished, but contains Docket Nos. 99-4279 and 99-4280, and is reprinted in the Appendix to this Petition, at pages 1a-28a. The Petitioner's Petition for Rehearing En Banc was denied by Order filed July 12, 2000, in the Court of Appeals in the case bearing Docket Nos. 99-4279 and 99-4280, a copy of which is reprinted in the Appendix to this Petition at pages 41a-42a. The prior Opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, entered March 22, 1999, is unpublished, but is docketed in the United States District Court for the Eastern District of Virginia, Norfolk Division, Criminal Action Nos. 2:99cr6 and 2:99cr7, and is reprinted in the Appendix to this Petition at pages 29a-40a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on July 12, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution. The Fourth Amendment states in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

On October 7, 1998, at approximately 10:50 p.m., Officer M. A. Bracey of the Virginia Beach Police Department was dispatched to the Burger King in the 500 block of Laskin Road as a result of a 911 hang up. Upon arrival, based on statements given to him by one of two Burger King employees standing in front of the Burger King, Officer Bracey learned that the Appellees had made the Burger King manager nervous by remaining in the restaurant for "a while" and that she had made the 911 call but hung up with the Appellees left the restaurant. Transcript of Suppression Hearing, March 16, 1999, at 14 (hereinafter cited as "Tr. at __"). Further, Officer Bracey was told by the employee that the Burger King manager had overreacted and that the two Appellees had not been doing anything wrong. Tr. at 16-18, 33, 40, 66. No evidence of wrongdoing by the Appellees was observed or reported to Officer Bracey, including trespass, and he simply wanted to get more information from them. Tr. at 23-24. Officer Bracey never spoke with the Burger King manager before apprehending the Appellees. Tr. at 12.

Shortly after Officer Bracey's arrival, the Appellees walked away from the Burger King and headed west on Laskin Road on foot. Officer Bracey pursued, activated his grill lights, pulled his vehicle up closely behind Appellees, stopped his vehicle, got out of his vehicle and told Appellees he wanted to speak with them, approached the Appellees and began to question them. Tr. at 16-18, 23-35, 41.

Officer Bracey prefaced his questioning of the Appellees by employing a ruse in order to "kind of justify" his actions and to ensure that they cooperated. Tr. at 27. He did this by informing them that there had been a "series" of robberies

in the area recently and that he wanted to make sure they were not "up to no good". Tr. at 7, 27 and 29. In fact, there was no reported robbery in the area that evening and the officer had no information the Appellees matched the description of any robbery suspects. Tr. at 19. Officer Bracey candidly admitted he employed the ruse because he did not want the Appellees to leave. Tr. at 28.

Appellee Williams, standing next to Appellee Dourdoumis, said nothing and stayed stationary without moving. Appellee Dourdoumis, on the other hand, began remonstrating, telling the officer "no, we were just walking home". Tr. at 7. Officer Bracey makes no mention of observing any furtive movements or any other indications that the Appellees might be presently armed and/or dangerous. In fact, when Appellee Dourdoumis explains that they were "just walking home" after getting off work at the oceanfront, Officer Bracey responds "fine". However, he then asked if they had weapons on them and if he could pat them down explaining it was a pat down for weapons only. Tr. at 7-8. Appellee Williams never consented to be searched. Officer Bracey never saw any bulging from Williams' pockets or waistband indicating a weapon and had no other indication Williams had any contraband on his person. Tr. at 19. Neither Appellee made any verbal consent to search, However, Appellee Dourdoumis laid his jacket down (that was draped over his arm) and spread his legs and held his hands straight out, again explaining that they were simply waiting for a ride. Tr. at 8. As he said this, Officer Bracey patted Appellee Dourdoumis down while Appellee Williams was in his line of sight. After finding nothing on Appellee Dourdoumis, Officer Bracey searched his coat and discovered a gun. Officer Bracey immediately withdrew his weapon and ordered both Appellees to the ground. They complied. Tr. at 8. At the suppression hearing, Officer

Bracey makes no mention during this entire chronology of events leading to the discovery of the weapon that either Appellee gave him reason to be concerned for his safety.

A back-up officer arrived, the two Appellees were handcuffed and Appellee Williams was searched revealing the marijuana. Subsequent to their arrests, both Appellees made inculpatory statements. Other than hearing evidence offered by Officer Bracey, no evidence was presented that Williams had been provided *Miranda* rights before making such alleged inculpatory statements. Tr. at 20-21.

In its ruling on the Appellees' Motion to Suppress, the District Court analyzed the encounter in the context of *Terry* and found that Officer Bracey lacked a particularized suspicion sufficient to justify the constitutional intrusion and granted Appellee's Motion.

On April 19, 1999, the Government noticed its appeal under 18 U.S.C. § 3731 of the decision of the United States District Court, for the Eastern District of Virginia, Norfolk Division, the Honorable Raymond A. Jackson, United States District Judge, issued on March 22, 1999. At the time the Government noticed its appeal to this Court, it had neither the intent nor the authority to appeal that portion of the District Court's Opinion and Order holding that the police encounter with the Appellees was merely a consensual police-citizen encounter outside the scope of the Fourth Amendment which became the basis of the Fourth Circuit's Opinion. Instead, the Government limited its appeal to the issue of whether there existed reasonable suspicion to justify a *Terry* stop-and-frisk. Alessandra DeBlasio, Assistant United States Attorney, candidly admitted the Government's

lack of intent and authority during oral argument before the Fourth Circuit on February 29, 2000, stating that her supervisor denied her authority to appeal on the basis that the encounter was a consensual police-citizen encounter. The limited scope of the Government's appeal from the District Court's Opinion and Order is confirmed by the Government's Supplemental Memorandum dated March 8, 2000, filed herein, wherein the Government stated: "Our authorized appeal was limited to the argument that reasonable suspicion justified the *Terry* stop-and-frisk." Gov't Supplemental Memo at 2.

The Docketing Statement, dated April 30, 1999, filed by the Government below, limits the "Issues to be raised on appeal" as follows: "Whether the district court erred in concluding that there was no reasonable suspicion justifying the investigative detention." The Government's Opening Brief, filed below, stated the "Question Presented" as follows: "Whether there was reasonable suspicion for a *Terry* stop of the defendants." The argument presented in the Government's Opening Brief was limited to addressing that question presented. Appellees' Response Brief limited its argument to the *Terry* analysis of reasonable suspicion. The Government's Reply Brief was likewise limited to the *Terry* analysis of reasonable suspicion. The issue of whether the encounter may be characterized as a consensual police-citizen encounter was in fact roused by a member of the three-judge panel of the Fourth Circuit Court of Appeals during oral argument, and later became the basis of the Fourth Circuit's Opinion, to which this Petition is directed.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT LACKED JURISDICTION TO ENTERTAIN THE QUESTION WHETHER THE POLICE ENCOUNTER WITH APPELLEES WAS A CONSENSUAL POLICE-CITIZEN ENCOUNTER WHICH DID NOT INVOKE FOURTH AMENDMENT RIGHTS

In the instant case, there is no dispute that the Government appealed only from that portion of the District Court's Opinion and Order that concluded there existed no "reasonable suspicion" to justify the police's *Terry* stop of Appellees. Not only did the Government candidly admit that it had no intent or authority to appeal from any other aspect of the District Court's Opinion and Order, but also, the Government's conduct as evidenced in the Docketing Statement and Opening Brief and Reply Brief demonstrate that it appealed only from this single issue of the District Court's Opinion and Order. Where a party appeals from only a portion of the District Court's ruling, the Court of Appeals is without jurisdiction to review unappealed parts of that judgment. *Alma Motor Co. v. Timkin-Detroit Axel Co.*, 67 S. Ct. 231, 329 U.S. 129, 91 L. Ed. 128 (1946); *Gunther v. E.I. Du Pont De Memours & Company*, 255 F.2d 710, 717-718 (4th Cir. 1958).

In the instant case, the Government's Notice of Appeal filed with the District Court on April 19, 1999, appealed generically "from the decision of this Court on March 22, 1999, suppressing evidence . . ."; however, the Government, by its own admission, had neither intent nor authority to

appeal the issue of whether there was a consensual police-citizen encounter. Courts of Appeals will sometimes consider other documents filed by Appellant in addition to the Notice of Appeal to ascertain the intended scope of appeal. In this case, this Court should consider the Appellant's Docketing Statement which limits the issues raised on appeal to "whether the district court erred in concluding there was no reasonable suspicion justifying the investigative detention and search." *See Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*, 119 F.3d 847 (10th Cir. 1997); *Cooper v. American Auto Insurance Co.*, 978 F.2d 602 (10th Cir. 1992); *Traveno-Barton v. Pittsburgh National Bank*, 919 F.2d 874 (3d Cir. 1990). Furthermore, this Court should look to the sole issue raised on appeal in the Government's Opening Brief and Reply Brief, which is limited to "[w]hether there was reasonable suspicion for a *Terry* stop of the defendants." *See Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981); *Murray v. Commercial Union Insurance Co.*, 782 F.2d 432 (3d Cir. 1986).

Appellees acknowledge that, in order to avoid technical impediments to appellate review, Courts of Appeals construe FRAP Rule 3(c) liberally. *Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 974 (4th Cir. 1997). However, this Rule applies only where there has been an error in designating the issue appealed and the Appellee is not prejudiced by the mistake. *Id.* Here, the Appellees were mislead by the Government's limitation of the issue on appeal as set forth in the Docketing Statement and its Opening Brief and Reply Brief, and therefore only addressed the *Terry* stop issue in its Brief. Furthermore, Appellees suffered extreme prejudice by the Government's limitation of its issue on appeal because it was unprepared at oral argument to address the consensual

police-citizen encounter issue, as it had no notice that the same was before the Court. Furthermore, although the Fourth Circuit granted the opportunity to submit a "short supplemental memoranda on whether this case involved a consensual police encounter", and given the limited period of seven (7) days to respond after receiving the Government's Memorandum, this limited opportunity falls far short of the rights Appellees had under this Fourth Circuit's Briefing Order which permitted Appellees to address issues appealed in greater length. Thus, Appellees have been denied the full opportunity to present a defense of the appeal and have been prejudiced thereby.

II.

THE GOVERNMENT WAIVED THE CONSENSUAL POLICE-ENCOUNTER ARGUMENT BY FAILING TO RAISE IT IN ITS BRIEF

Even if one were to conclude that this Court has jurisdiction to address the consensual police-citizen encounter issue on appeal through a broad construction of the Government's Notice of Appeal and by ignoring the lack of Government intent and authority to appeal such issues, which Appellees deny for the reasons set forth above, it is well settled law that issues raised in a Notice of Appeal but not briefed on appeal are deemed waived. *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 628 n.6 (4th Cir. 1999); *Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 973-974 (4th Cir. 1997), *citing Williams v. Chater*, 87 F.3d 702, 706 (4th Cir. 1996) (holding that issues raised in Notice of Appeal but not briefed on appeal are deemed waived); *Cumberland Farms, Inc. v. Montague Econ. Dev. and Indus. Corp.*, 78 F.3d 10, 12 n.1 (1st Cir. 1996) (holding

that appellant waived an issue raised in the Notice of Appeal when it did not refer to the issue in its brief); *Tilson v. Forrest City Police Dep't.*, 28 F.3d 802, 806 n.8 (8th Cir. 1994) (holding that appellant waived issues that it raised in Notice of Appeal but failed to brief on appeal).

The facts of this case are not controverted. The Government admittedly lacked the intent and authority to appeal the District Court's Order relating to the consensual police-citizen encounter issue. The Government thereafter failed to address such issue in the Docketing Statement, the Government's Opening Brief and Government's Reply Brief. To now allow the Government to avoid the thirty (30) day time limitation for appeals as set forth in FRAP 3(c) and belatedly assert, as it did in its March 8, 2000, Supplemental Memorandum in the Fourth Circuit, that it now wishes "to preserve the issue of a consensual police encounter," subverts the rule of law, is fundamentally unfair to Appellees, and prejudices Appellees' right and ability to present a thorough defense to the appeal. Accordingly, this Court should follow the well established rule of law of this Court and conclude that the Government has waived its right to assert the consensual police-citizen encounter argument on appeal.

III.

THE FOURTH CIRCUIT IMPROPERLY DISREGARDED THE DISTRICT COURT'S FACTUAL FINDINGS THAT THE POLICE OFFICERS' ENCOUNTER WITH APPELLEES WAS NOT A CONSENSUAL POLICE-CITIZEN ENCOUNTER BEYOND THE SCOPE OF THE FOURTH AMENDMENT BUT RATHER AN UNREASONABLE SEARCH AND SEIZURE

Notwithstanding Appellees' conviction that the Fourth Circuit lacked jurisdiction to address the question of whether the police officers' encounter with Appellees was a consensual police-citizen encounter beyond the scope of the Fourth Amendment, as set forth hereinabove, and without waiving such argument, Appellees demonstrate hereinbelow that the encounter between the police and Appellees amounted to a seizure under the Fourth Amendment and that the Government lacked reasonable suspicion and probable cause for such seizure.

The Fourth Amendment is not implicated in a "police-citizen encounter" where law enforcement officers approach someone in a public place and speak with him or her or ask him or her to answer a few questions. *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1853 (1993). However, the Fourth Amendment is implicated once an individual has been "seized" or, in other words, once the individual is no longer "free to leave". *Florida v. Royer*, 460 U.S. at 502; *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1986).

In determining whether a seizure has occurred, the test is whether, in view of all of the surrounding circumstances, a reasonable person would have believed he was not free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (*quoting Mendenhall*, 446 U.S. at 554). The Fourth Circuit has stated that, in order to determine that an encounter is consensual:

> . . . The appropriate inquiry for the trial court is whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter.

United States v. Rusher, 966 F.2d 868, 877 (4th Cir. 1992). The inquiry generally focuses on three (3) areas: (i) the conduct of the police; (ii) the unique characteristics of a particular defendant; and (iii) the physical surroundings of the encounter. *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989).

The District Court's determination whether a seizure occurred is factual in nature and will be overturned on appeal only if "clearly erroneous". *Wilson*, 895 F.2d at 172; *Gordon*, 895 F.2d at 937-938; *United States v. Clark*, 891 F.2d 501 (4th Cir. 1989); *United States v. Porter*, 738 F.2d 622, 625 (4th Cir. 1984), *cert. denied*, 469 U.S. 983 (1984). A finding is "clearly erroneous" when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). As Judge Michael correctly pointed out in his dissenting opinion:

> The Majority does not directly challenge any of the district court's specific findings of fact, which may be disturbed only if they are "clearly erroneous." [citation omitted.] Instead, the majority simply

> concludes that the district court's ultimate finding that the encounter between Officer Bracey and the defendants was not consensual, is "implausible in light of the entire record." *Anti* at 9. The record, however, provides ample support for the district court's conclusion.

App. at 21a-22a.

In the instant case, the District Court made no mistake. The District Court found important the following facts upon which it based its conclusion that the Appellees' encounter with the police was not a consensual encounter such that a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter:

1. The police officers' own testimony revealed that his purpose was not, in fact, to ask questions, but to determine whether Appellees were "up to no good";

2. The police officer did not approach the Appellees with the intent of eliciting any variable information;

3. The police officer made eye contact with the Appellees at the Burger King, approached the Appellees with his vehicle lights flashing and communicated to them the fact that there had been several robberies in the area and that he would like to search them. Based on these factors, the District Court concluded that a reasonable person would under the circumstances of the encounter, not believe that he was free to terminate the interview and leave and that, accordingly, the stop is properly denominated a *Terry* stop. App. at 35a-36a.

The record in this case amply supports the District Court's findings. In the instant case, the conduct of the police officer, as amplified by his own testimony, demonstrates that the police officer asserted his authority over the Appellees late in the evening, by pulling within several yards of them with his red and blue lights flashing, in the dark, on the side of a road, with other police officers approaching the scene, advised Appellees there had been robberies in the area and that he wanted to see if they were up to no good, speaking to them in an authoritarian manner which was intended to prevent them from leaving so that he could search them. Each of these facts is demonstrated in the record.

First, when the officer approached the Appellees, he flipped on the marked police car cruiser grill lights, which were red and blue, and the rear dashboard red flashing lights. Officer Bracey testified that when he approached the Appellees he "was several yards behind them, pulled off the road and got out and approached them on foot to speak with them." As Judge Michael states in the following passage from his dissenting opinion, the flashing red and blue lights would give a reasonable person that he was not free to leave:

> Here, Officer Bracey displayed an unmistakable show of authority that would give a reasonable person the impression that he was not free to leave. A uniformed police officer in a marked police car with red and blue lights flashing constitutes a substantial show of authority in and of itself. *See Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (noting that "police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit"); *Clarke v. Commonwealth*, __ S.E.2d __, No. 0425-

> 99-1, 2000 WL 486257, at *4 (Va. Ct. App. Apr. 25, 2000) ("We have held that when a police officer signals a motorist with his flashing lights, a reasonable motorist would conclude that he must comply with the officer's authority and stop, and that such a stop constitutes a Fourth Amendment seizure."; *Barrett v. Commonwealth*, 447 S.E.2d 243, 245 (Va. Ct. App. 1994) ("Clearly, Barrett was seized when Trooper Lyons pulled in behind him and activated his flashing lights."), *aff'd in relevant part, rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995); *Beckner v. Commonwealth*, 425 S.E.2d 530, 535 (Va. Ct. App. 1993) (Commonwealth conceding that officer seized defendant when he activated emergency lights on marked police vehicle.)

(Footnote omitted). App. at 22a. Furthermore, Judge Michael cites ten (10) additional cases. In Footnote 1 to his dissenting opinion that supports the general proposition that flashing red and blue lights present an obvious, unmistakable show of authority with an implicit command to stop. *See* App. at 22a-23a.

After Officer Bracey called out to them, both of the Appellees stopped and turned to face Officer Bracey, who told them that "somebody felt like Burger King was going to be robbed and [he] wanted to make sure that they weren't up to no good." The police officer also informed the Appellees that there had been a series of robberies in the area, although that statement was not true, but rather was a ruse used by the officer to "justify [his] actions". The police officer clearly intended to assert his authority over Appellees

during this conversation, as revealed by the police officers own testimony:

> I went up to speak to them like a principal was speaking to a child or a police officer was speaking to a suspect.

The officer testified that he spoke to them in this tone because he wanted them not to leave. As Judge Michael concludes in his dissenting opinion:

> The record does not support the majorities's assertion that Officer Bracey spoke to Williams and Dourdoumis "in a very conversational way." *Anti* at 6. To the contrary, Bracey testified that he spoke to the two men authoritatively, "like a principal was speaking to a child or *a police officer was speaking to a suspect.*"

(Emphasis added.) App. at 24a. In fact, based upon the facts presented at trial, the District Court Judge found: "This is not a situation where the police [officer was] simply questioning these defendants because he wanted to know something somebody else was doing or something that might be happening in the area. This officer's focus was on these defendants." As Judge Michael states in the dissenting opinion:

> The majority tries to brush aside this factual finding by saying that it rests on a faulty legal premise . . . Based on everything Officer Bracey said and did, the district court found that this was an encounter in which the officer had focused his attention on these particular suspects. That factual finding did not rest on any legal premise at all. The majority's quarrel

> is with the district court's *legal conclusion* that the stop was not consensual. But an appellate court cannot disregard a district court's findings of fact just because it disagrees with that court's subsequent conclusions of law.

App. at 26a.

Finally, as the District Court found, Officer Bracey used the ruse because it "was effective in getting individuals to consent to searches." The majority in the Fourth Circuit Opinion questioned the District Court's finding that Officer Bracey's real purpose in approaching the Appellees was to search them rather than to ask them questions. App. at 12. However, this factual finding cannot be overturned unless found to be "clearly erroneous". As Judge Michael's dissenting opinion notes, Bracey's "ruse" and request for search combined to create a situation where a reasonable person would not feel free to leave:

> As the district court clearly recognized, Bracey's implication that he suspected the defendants of robbery and a statement that he wanted to make sure they "weren't up to no good" were calculated to give the two suspects the impression they were not free to leave. Bracey's "ruse," combined with his request to search for weapons, plainly conveyed his intent to detain Williams and Dourdoumis.

App. at 27a. The ruse was a whether the foregoing facts demonstrate, the District Court's conclusion that a reasonable person would not feel free to terminate an encounter with the police officer when confronted with a marked police car with flashing lights pulling within "several yards" of the Appellees late at night, on the side of a road, and the officer confronting

them with the intent to determine if they were up to no good, making accusations of a potential robbery at Burger King and a series of robberies in the area and asserting authority over them as a principal asserts authority over a school child, cannot be overturned as "clearly erroneous".

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED JUNE 5, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99-4279

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

LAWRENCE MARCELL WILLIAMS,

Defendant-Appellee.

No. 99-4280

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

VASILIOS DOURDOUMIS,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Raymond A. Jackson, District Judge.
(CR-99-6, CR-99-7)

Appendix A

Argued: February 29, 2000

Decided: June 5, 2000

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

* * *

OPINION

TRAXLER, Circuit Judge:

Lawrence Marcell Williams and Vasilios Dourdoumis (the "Defendants") were indicted on various charges stemming from their illegal possession of handguns. The Defendants moved to suppress the evidence obtained during what they contended was an illegal search and seizure. The district court granted the suppression motions, and the government now appeals. We reverse and remand.

I.

Shortly before eleven o'clock one evening, Virginia Beach police officer Matthew Bracey was dispatched after a "9-1-1 hang-up" call to the Burger King restaurant where the call originated. J.A. 21. The restaurant was located in a part of town where robberies were reported from time to time.

When he arrived at the restaurant, Officer Bracey saw the Defendants standing outside using a pay phone attached to the front of the building. Bracey also saw two Burger King

employees outside the restaurant, on the other side of the restaurant entrance from the Defendants. Bracey, who was in uniform, parked his marked police car near the employees, away from the Defendants, and approached the employees. One of the employees told Bracey that the Defendants had entered the restaurant without ordering and had gone into the bathroom, where they had stayed for an extended period. According to the employee, the manager became nervous and called 911. Because the Defendants left the bathroom and walked out of the restaurant just as the manager placed the call, she hung up before speaking to the dispatcher. The employee told Bracey that the Defendants "weren't doing anything wrong" and that the manager "was overreacting" when she called 911. J.A. 33.

As Bracey approached the employees, the Defendants looked at him and then began walking away from the restaurant. After talking with the employees, Bracey did not wait to talk to the manager, but instead got back in his car and caught up with the Defendants, who were still walking, not far from the restaurant. Bracey pulled his car off the road several yards behind the Defendants, turning on the flashing lights located in the back window and in the front grill of the car so the car would be visible to traffic. Bracey did not activate the overhead lights.

The Defendants kept walking until Bracey got out of his car, walked up to them, and asked if he could "talk to them for a minute." J.A. 24. Bracey explained that he had been dispatched to the Burger King because "somebody felt like the Burger King was going to be robbed." J.A. 24. Bracey told the Defendants that there had been a "series of robberies"

in the area, J.A. 46, and that he "wanted to make sure they weren't up to no good." J.A. 24. Bracey readily admitted at the suppression hearing that he had no knowledge of any robberies that night and that his statement was a "ruse" intended to encourage the Defendants' cooperation.

The Defendants stopped walking when Bracey asked if he could talk to them. Dourdoumis told Bracey that they worked at an oceanfront restaurant and were just walking home. Bracey asked Dourdoumis if he could pat him down for weapons, specifically telling Dourdoumis that he was not looking for drugs. Although Dourdoumis made no verbal reply, he put down the leather jacket he was carrying over his arm, held his arms straight out, and spread his legs. While Bracey patted him down, Dourdoumis told the officer that he and Williams "were just waiting for a ride." J.A. 25. Bracey found nothing in his frisk of Dourdoumis.

Bracey then picked up the leather jacket that Dourdoumis had placed on the ground and noticed that it felt unusually heavy. Bracey squeezed the inside breast pocket and felt a gun. Bracey dropped the jacket, withdrew his own gun, and ordered Dourdoumis and Williams to lie down on the ground. They immediately complied. Another police unit had arrived on the scene at this point, and an officer from that car handcuffed the Defendants and discovered another handgun in the waistband of Williams's pants. The serial numbers of both guns had been obliterated. After the Defendants were arrested, Williams gave statements indicating that he and Dourdoumis bought the handguns together and that they knew when they bought the guns that the guns were stolen.

Appendix A

Williams and Dourdoumis were charged with knowingly possessing stolen firearms, *see* 18 U.S.C.A. § 922(j) (West Supp. 1999), and with knowingly possessing firearms with obliterated serial numbers, *see* 18 U.S.C.A. § 922(k) (West Supp. 1999). Dourdoumis was also charged with being a felon in possession of a firearm. *See* 18 U.S.C.A. § 922(g)(1) (West Supp. 1999).

The Defendants moved to suppress, arguing that the initial stop was improper because Officer Bracey lacked a reasonable suspicion to believe that the Defendants were involved in a crime. The district court granted the Defendants' motions.

The court rejected the government's argument that the encounter between Bracey and the Defendants was a consensual police-citizen encounter and thus outside the reach of the Fourth Amendment, instead concluding that the encounter was a stop governed by *Terry v. Ohio*, 392 U.S. 1 (1968). The court then determined that Officer Bracey lacked a particularized suspicion that the Defendants were involved in criminal activity. Finally, the district court ruled that while Dourdoumis's "actions were reasonably construed as suggesting consent," a reasonable person would have believed that consent was compelled. J.A. 72. The district court thus concluded that the pat-down search of Dourdoumis was improper. The court also concluded that any consent from Dourdoumis did not extend to a search of the leather jacket.

Appendix A

II.

Appealing the suppression of the evidence pursuant to 18 U.S.C.A. § 3731 (West Supp. 1999), the government contends the district court erred in ruling that this case involved a *Terry* stop rather than a consensual encounter between the Defendants and Officer Bracey. We agree.

"Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *Id.* (citation and internal quotation marks omitted); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

Whether an encounter between citizens and the police is a Fourth Amendment seizure or a consensual encounter raising no constitutional questions is an issue of fact that cannot be reversed unless the district court's findings are clearly erroneous. *See United States v. Porter*, 738 F.2d 622, 625 (4th Cir. 1984) (en banc); *accord United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989). However, "[b]ecause the test [to determine whether an encounter was consensual or a Fourth Amendment seizure] is an objective one, its proper application is a question of law." *United States v. Sullivan*, 138 F.3d 126, 133 (4th Cir. 1998).

Appendix A

Determining whether an encounter was consensual requires consideration of many different factors, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554; *cf. Gray*, 883 F.2d at 322 ("The federal courts have examined a variety of factors when determining whether a particular police-citizen encounter constitutes a seizure in the context of airport surveillance. They have, however, tended to focus on three particular areas: (1) the conduct of the police; (2) the characteristics of a particular defendant; and (3) the physical surroundings of the encounter."). After considering the facts in light of the appropriate factors, we conclude that this case involves a quintessential consensual police-citizen encounter, and not a seizure within the meaning of the Fourth Amendment.

There is nothing in the conduct of Officer Bracey that would cause a reasonable person to believe that he was not free to ignore Bracey's questions or to terminate the encounter. The encounter initially involved only Officer Bracey and the Defendants. When he approached the Defendants, Bracey asked in a very conversational way whether he could ask them a few questions.[1] Bracey did not

1. The dissent contends this characterization of Officer Bracey's tone of voice is not supported by the record, focusing on Bracey's statement that he spoke to the Defendants "like a principal was speaking to a child or a police officer was speaking to a suspect." J.A. 44. However, Bracey's next statement was that he "was talking

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display his weapon until after he found the gun in Dourdoumis's jacket, and he did not touch the Defendants or in any way prevent them from leaving until the gun was found. Although Bracey told the Defendants that he "wanted to make sure they weren't up to no good," this statement did not indicate that the Defendants were the subjects of a particularized investigation.[2] While Bracey was in uniform and had activated the flashing grill lights on his police car, he did not activate the overhead lights, and he parked the car several yards behind the Defendants before approaching them on foot. Thus, we conclude that Officer Bracey's limited "show of authority" would not cause a reasonable person to believe he was not free to leave. In addition, the encounter took place in a parking area beside a public street and, as noted above, Bracey did nothing to prevent the

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to them like people, just in a normal tone of conversation." J.A. 44. Considering Officer Bracey's testimony as a whole and in context, we believe this conclusion is amply supported by the record. We also note that the district court did not make any factual findings about Bracey's tone of voice, nor did the court include Bracey's tone of voice as a reason for rejecting the consensual encounter theory.

2. When determining whether a "show of authority" converts an encounter into a seizure, one consideration is "whether the officer informed the defendant that he positively suspected him of illegal activity rather than treating the encounter as 'routine' in nature." *Gray*, 883 F.2d at 323. We see no meaningful difference between Officer Bracey's up-to-no-good statement and the "you're-not-carrying-any-drugs-are-you?" kind of question asked in many of the airport stop cases that have also been found to involve consensual encounters. *See, e.g., id.*

Defendants from continuing their walk. These facts further indicate that the encounter was consensual. *See United States v. Morgan*, 914 F.2d 272, 274 (D.C. Cir. 1990) (per curiam) ("Wherever its precise boundaries may lie, a seizure requires more than the initial encounter detailed in this record: officers who, displaying no weapons and speaking in a normal tone of voice, approach individuals in a public place and ask permission to talk with them.").

The dissent focuses much of its attention on Officer Bracey's use of the flashing grill lights when he pulled his cruiser in behind the defendants. However, most of the cases cited by the dissent to show that the use of flashing lights amounts to a show of authority and a stop do not involve pedestrians but instead involve situations where the police used flashing lights in the course of stopping or attempting to stop a moving vehicle. *See Brower v. County of Inyo*, 489 U.S. 593, 594 (1989); *McChesney v. State*, 988 P.2d 1071, 1073 (Wyo. 1999); *Brooks v. State*, 745 So. 2d 1113, 1113 (Fla. Dist. Ct. App. 1999); *State v. Yeargan*, 958 S.W.2d 626, 627-28 (Tenn. 1997); *Barrett v. Commonwealth*, 447 S.E.2d 243, 244 (Va. Ct. App. 1994), *rev'd*, 462 S.E.2d 109 (Va. 1995); *Beckner v. Commonwealth* , 425 S.E.2d 530, 531 (Va. Ct. App. 1993); *State v. Langseth*, 492 N.W.2d 298, 299 (N.D. 1992); *State v. Indvik*, 382 N.W.2d 623, 624 (N.D. 1986); *State v. Walp*, 672 P.2d 374, 374-75 (Or. Ct. App. 1983).[3] Given that it typically is a crime *not* to stop a vehicle

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3. In the cases that did not involve attempts to stop a moving vehicle, the defendants were sitting in or standing near parked cars (in some cases, with the engine running) when approached by the police. *See Clarke v. Commonwealth*, 2000 WL 486257, at *1

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when so signaled by law enforcement, *see, e.g.*, Va. St. Ann. § 46.2-817 ("Any person who, having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful and wanton disregard of such signal, shall be guilty of a Class 4 misdemeanor."), we do not find these cases particularly instructive. Moreover, we again point out that the Defendants *did not stop* when Officer Bracey parked his car behind them while they were walking down the street. They did not stop until Officer Bracey caught up with them and asked if he could ask them some questions. While the determination of whether an encounter was consensual is an objective one, that the Defendants did not feel compelled to stop when Bracey turned on his flashing lights raises some question about the dissent's conclusion that a reasonable person would have felt compelled to stop.

Finally, we simply disagree with the dissent about the legal significance of the district court's statement from the bench that "[t]his is not a situation where the police [officer] . . . simply question[ed] these defendants because he wanted to know about something somebody else was doing or something that might be happening in the area. This officer's focus was on these defendants." J.A. 59. As we noted above, "whether the officer informed the defendant that he positively suspected him of illegal activity rather than treating the encounter as 'routine' in nature" is relevant to the show-of-

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(Va. Ct. App. Apr. 25, 2000); *State v. Donahue*, 742 A.2d 775, 778 (Conn. 1999); *Lawson v. State*, 707 A.2d 947, 949 (Md. Ct. Spec. App. 1998); *State v. Burgess*, 657 A.2d 201, 202 (Vt. 1995); *State v. Stroud*, 634 P.2d 316, 317 (Wash. Ct. App. 1981).

authority inquiry when determining whether an encounter was consensual. *Gray*, 883 F.2d at 323. The district court's statement, however, seems to suggest that an encounter can never be consensual if the officer believes that the person he has stopped in fact committed a crime and the officer questions that person about his own activities. Clearly, that is an incorrect analysis of the law. *See, e.g., United States v. Wilson*, 895 F.2d 168, 170-71 (4th Cir. 1990) (per curiam) (finding encounter between a DEA agent and the defendant to be consensual even though the agent became suspicious of the defendant after watching the defendant in an airport and even though the agent approached the defendant, identified himself as a DEA agent, asked the defendant if he was carrying any drugs, and asked the defendant if he could search him). To the extent that the district court's statement amounts to a factual finding, it appears to rest on an incorrect legal principle, and we thus owe it no deference. *See Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 128 (4th Cir. 1995) ("[T]he clearly erroneous rule does not protect findings 'made on the basis of the application of incorrect legal standards.' " (quoting *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984)).

After considering the record as a whole, we conclude that a reasonable person would have felt free to decline Officer Bracey's request to answer some questions or to otherwise terminate the encounter. *See Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (The *Mendenhall* free-to-leave standard "is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation."); *see also*

United States v. Analla, 975 F.2d 119, 121-25 (4th Cir. 1992) (finding encounter between defendant and two, then later three, police officers to be consensual in case where officers parked a police car on either side of the defendant's car at 45-degree angles to the car; officers asked to see the defendant's license and registration and informed the defendant that he matched the description of a murder suspect; and officers never told the defendant that he was free to leave, that he could refuse to answer their questions, or that he could refuse the search of his car). Accordingly, we conclude that the district court clearly erred when it determined that the encounter between the Defendants and Officer Bracey was not consensual.[4] *See United States v. Lattimore*, 87 F.3d 647, 651 (4th Cir. 1996) (en banc) (A district court's factual determination is clearly erroneous if "it can be said that the view of the evidence taken by the district court is implausible in light of the entire record.").

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4. When ruling that the encounter was not consensual, the district court found it significant that Officer Bracey's real purpose in approaching the Defendants was to search them rather than to ask them questions. While we question whether the record supports the district court's characterization of Officer Bracey's purpose, we note that even if Officer Bracey's ultimate, or only, purpose was to search the Defendants, that does not prevent the encounter from being a consensual police-citizen encounter. *See United States v. Wilson*, 895 F.2d 168, 171 (4th Cir. 1990) (per curiam) ("[A] permissible encounter does not mature into a seizure when an otherwise consensual search occurs."). Moreover, the inquiry into whether an encounter was a consensual one or a seizure is an objective one. *See id.* The police officer's subjective intentions, therefore, do not automatically convert a consensual encounter into a Fourth Amendment seizure.

Appendix A

III.

Because we conclude that the encounter was a consensual one, we must now turn to the issue of the pat-down search of Dourdoumis and the discovery of the gun in his leather jacket. When Officer Bracey asked if he could pat down Dourdoumis to see if he was carrying any weapons, Dourdoumis responded by putting down the jacket he was carrying and spreading out his arms and legs. The district court ruled that while these "actions were reasonably construed as suggesting consent, . . . any reasonable person would, under the circumstances of the encounter, believe that consent was required and that he was not free to terminate the encounter, refuse the search and leave." J.A. 72. The district court therefore concluded that the search was illegal and that Dourdoumis did not consent to the search of his jacket.

As we understand the district court's order, the court concluded that the otherwise consensual pat-down of Dourdoumis was tainted by what the court viewed as an illegal detention. *See Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (plurality opinion) ("Because we affirm the . . . conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search."). However, as discussed in the previous section, the encounter between the Defendants and Officer Bracey was a consensual police-citizen encounter; thus, there was no illegality to taint any consent given by Dourdoumis. The district court's consent determination is a factual one generally reviewed under the clearly erroneous standard.

See Lattimore, 87 F.3d at 650. However, that standard is inapplicable where, as here, the factual determination is premised upon an incorrect conclusion of law. *See Consolidation Coal Co.*, 48 F.3d at 128; *see also United States v. Hare*, 150 F.3d 419, 426 (5th Cir. 1998) ("On appeal, this court accepts the trial court's factual findings at a suppression hearing unless they are clearly erroneous or influenced by an incorrect view of the law."). We therefore proceed to determine *de novo* whether Dourdoumis voluntarily consented to the search.

When determining whether a consent to search was voluntarily given,

> the totality of the circumstances surrounding the consent must be examined. In viewing the totality of the circumstances, it is appropriate to consider the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter).

Lattimore, 87 F.3d at 650 (citation omitted).

In our view, Dourdoumis's actions clearly amounted to a consent to search. *See United States v. Smith*, 30 F.3d 568, 571 (4th Cir. 1994) (concluding that defendant consented to request to search his car by unlocking the car door); *Wilson*, 895 F.2d at 172 (concluding that defendant consented to officer's request to pat him down by "shrugging his shoulders

and raising his arms"). And our review of the record convinces us that the consent was voluntarily given. The request to search was made by a single officer during a consensual encounter in a public area, and nothing in the way in which the request was phrased suggested that Dourdoumis was required to comply. Although the record contains scant evidence about Dourdoumis himself, *see Wilson*, 895 F.2d at 171 (observing that whether a defendant consented to a search is a subjective inquiry), we note that Dourdoumis and Williams did not stop walking when Officer Bracey parked his police car on the side of the road several yards behind them, but only when Bracey got out of the car and asked if he could talk to them. In our view, this indicates that Dourdoumis was not intimidated by the mere presence of a police officer and that Dourdoumis fully recognized that he was free to ignore Officer Bracey if he so chose. After considering the totality of the circumstances surrounding the encounter and Dourdoumis's consent, we conclude that the consent was voluntarily given and that the pat-down was therefore proper.

The next question we must consider is whether Officer Bracey exceeded the scope of Dourdoumis's consent when he searched the leather jacket. We conclude that the search of the jacket was proper.[5]

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5. It is not clear from the record whether Officer Bracey intended to pat-down the jacket when he picked it up or if he was merely handing it back to Dourdoumis as a courtesy. Nonetheless, we assume for the purposes of this opinion that Bracey searched the jacket when he picked it up from the ground.

"When an official search is properly authorized — whether by consent or by the issuance of a valid warrant — the scope of the search is limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656 (1980) (plurality opinion); *see also United States v. McFarley*, 991 F.2d 1188, 1191 (4th Cir. 1993) ("While consent generally has its limits, a consensual search or seizure within those limits does not implicate constitutional rights."). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

In this case, Dourdoumis was carrying the leather jacket over his arm when Officer Bracey asked if he could pat down Dourdoumis for weapons. Given that weapons can easily be hidden in a coat pocket, a reasonable person would realize that consenting to a weapons pat-down would authorize the officer to pat down a coat carried by that person. *See Jimeno*, 500 U.S. at 251 ("The scope of a search is generally defined by its expressed object . . . . [The officer] had informed [Jimeno] that he believed [Jimeno] was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search [Jimeno's] car included consent to search containers within that car which might bear drugs."). We do not believe this conclusion changes simply because Dourdoumis put down the jacket before Bracey began the search, particularly since Dourdoumis did not object when Bracey picked up the jacket.

See United States v. Espinosa, 782 F.2d 888, 892 (10th Cir. 1986) ("Failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent."). We therefore conclude that the district court erred in determining that Dourdoumis did not consent to the search of his leather jacket.

IV.

Our conclusions that the encounter was consensual and that Officer Bracey's search of the leather jacket was proper disposes of Dourdoumis's arguments that the gun should be suppressed. *See McFarley*, 991 F.2d at 1191 ("When a private citizen voluntarily consents to interrogation or a search by police officers, however, he cannot later claim, when criminal conduct is uncovered, that his Fourth Amendment rights were violated."). As to Williams, however, the analysis is somewhat different, given that he did not speak during the encounter and did not consent to a search of his person.

When Officer Bracey found the gun in Dourdoumis's jacket, he clearly had probable cause to arrest Dourdoumis, but he did not then have probable cause to arrest Williams. Nonetheless, because Williams was with Dourdoumis at the Burger King and when the gun was found, the presence of the weapon on Dourdoumis gave Officer Bracey the right to perform a *Terry* pat-down to make sure Williams was not armed. *See United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973) (per curiam) (concluding that *Terry* pat-down of a companion of the person arrested was proper: "[A]ll companions of the arrestee within the immediate vicinity,

capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory pat-down reasonably necessary to give assurance that they are unarmed." (internal quotation marks omitted)).[6] That the pat-down was performed while Williams was on the ground and in handcuffs is insufficient, under the facts of this case, to convert the *Terry* stop-and-frisk into an arrest. *See United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (rejecting the argument that the use of handcuffs turned a *Terry* stop into an arrest: "Brief, even if complete, deprivations of a suspect's liberty do not convert a stop and frisk into an arrest so long as the methods of restraint used are reasonable to the circumstances."); *United States v. Tilmon*, 19 F.3d 1221, 1227-28 (7th Cir. 1994) (where officers believed suspect might be armed, ordering suspect to lie on the ground and handcuffing him did not convert *Terry* stop into an arrest). Once the gun was found on Williams, then there was probable cause to arrest him as well.

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6. There may be circumstances where a blind application of the apparently *per se* rule announced in *Poms* might be inappropriate. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (A warrant authorizing the search of a bar and its bartender does not authorize a pat-down of the bar's patrons absent an individualized suspicion that the patron to be searched was armed and dangerous; "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place."). Given the circumstances of the encounter here, however, we have no doubt that the pat-down of Williams was appropriate to protect Officer Bracey's safety.

V.

To summarize, we conclude that the encounter between Officer Bracey and the Defendants was a consensual encounter not implicating the Fourth Amendment, that Dourdoumis voluntarily consented to a search of his person, and that Officer Bracey did not exceed the scope of that consent when he searched the leather jacket. The presence of the gun in that jacket gave Bracey probable cause to arrest Dourdoumis, which gave Bracey the right to frisk Williams for weapons.[7] The district court, therefore, clearly erred by granting the Defendants' suppression motions. Accordingly, we reverse the district court's suppression order and remand to the district court for further proceedings.

REVERSED AND REMANDED

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7. Given these conclusions, we need not consider whether the encounter between the Defendants and Officer Bracey could be sustained under *Terry v. Ohio*, 392 U.S. 1 (1968).

Appendix A

MICHAEL, Circuit Judge, dissenting:

I agree that the test we apply here is the familiar one from *Florida v. Bostick*: "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." 501 U.S. 429, 434 (citation and internal quotation omitted). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In applying this test, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 439. My disagreement with the majority concerns its failure to give appropriate consideration to the findings of the district court or to recognize how the circumstances surrounding the encounter would actually appear to a reasonable person. I therefore respectfully dissent from Parts I and II of the majority's opinion. I would not reach the issues discussed in Parts III and IV.

I.

Late in the evening on October 7, 1998, Officer Matthew Bracey arrived at the Virginia Beach Burger King in a marked police car, dressed in his uniform. As he approached two restaurant employees who were working outside, Bracey made eye contact with both Lawrence Williams and Vasilios Dourdoumis, who were using a pay phone. Moments later, Bracey drove down the street to where Williams and

Dourdoumis were walking, stopping a few yards behind them in a dirt parking lot. Although he did not activate his overhead lights, Bracey turned on the red and blue flashing lights in the front grill of his police car and the flashing red lights in the rear window. The two men continued to walk along the road until Officer Bracey got out of his car and asked if he "could talk to them for a minute." Williams and Dourdoumis then turned around to see a uniformed officer leaving a marked police car with red and blue lights flashing in its front grill. Apparently before either Williams or Dourdoumis had said a word, Officer Bracey said that he had been dispatched to the Burger King because someone felt that it was "going to be robbed," that there had been a series of robberies in the area, and that he "just wanted to make sure that they weren't up to no good." Dourdoumis explained that he and his companion were simply walking home from work; Officer Bracey responded by asking whether they were carrying weapons and whether he could pat them down.

The district court summarized these events succinctly: "Officer Bracey testified that he made eye contact with the defendants at the Burger King, that he then approached them in his vehicle with lights flashing and that he communicated to them the fact that there had been several robberies in the area and that he would like to search them. A reasonable person would, under the circumstances of the encounter, not believe that he was free to terminate the interview and leave."

The majority does not directly challenge any of the district court's specific findings of fact, which may be disturbed only if they are "clearly erroneous." *See United States v. Porter*, 738 F.2d 622, 625 (4th Cir. 1984) (en banc). Instead, the majority simply concludes that the district court's

ultimate finding, that the encounter between Officer Bracey and the defendants was not consensual, "is implausible in light of the entire record." *Ante* at 9. The record, however, provides ample support for the district court's conclusion.

Here, Officer Bracey displayed an unmistakable show of authority that would give a reasonable person the impression that he was not free to leave. A uniformed police officer in a marked police car with red and blue lights flashing constitutes a substantial show of authority in and of itself. *See Brower v. County of Inyo* , 489 U.S. 593, 597 (1989) (noting that "police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit"); *Clarke v. Commonwealth*, __ S.E.2d __, No. 0425-99-1, 2000 WL 486257, at *4 (Va. Ct. App. Apr. 25, 2000) ("We have held that when a police officer signals a motorist with his flashing lights, a reasonable motorist would conclude that he must comply with the officer's authority and stop, and that such a stop constitutes a Fourth Amendment seizure."); *Barrett v. Commonwealth*, 447 S.E.2d 243, 245 (Va. Ct. App. 1994) ("Clearly, Barrett was seized when Trooper Lyons pulled in behind him and activated his flashing lights."), *aff'd in relevant part, rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995); *Beckner v. Commonwealth*, 425 S.E.2d 530, 535 (Va. Ct. App. 1993) (Commonwealth conceding that officer seized defendant when he activated emergency lights on marked police vehicle).[1] It is of no consequence, of course, that Officer

1. Flashing red and blue lights present an obvious, unmistakable show of police authority with an implicit command to stop. *See, e.g., Brooks v. State*, 745 So.2d 1113, 1113-14 (Fla. Dist. (Cont'd)

Bracey subjectively intended to make his police car visible to oncoming traffic; under the objective test of *Bostick* our sole consideration is the impression that the flashing red and blue lights would make on a reasonable person. *See, e.g.*, *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (holding that

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Ct. App. 1999) (uniformed officer's use of flashing blue lights, even as a safety precaution, created circumstance where reasonable person would not feel free to leave); *State v. Donahue*, 742 A.2d 775, 780 (Conn. 1999) (state conceded that no reasonable person would feel free to leave after police officer activated flashing lights on vehicle); *McChesney v. State*, 988 P.2d 1071, 1075 (Wyo. 1999) (motorist not free to leave after police officer activated red and blue flashing lights on police car); *Lawson v. State*, 707 A.2d 947, 951 (Md. Ct. Spec. App. 1998) (holding that officer's use of flashing emergency lights "was a show of authority that constituted a seizure within the contemplation of the Fourth Amendment because it communicated to a reasonable person that there was an intent to intrude upon [defendant's] freedom of movement"); *State v. Yeargan*, 958 S.W.2d 626, 630 (Tenn. 1997) ("When an officer turns on his blue lights, he or she has clearly initiated a stop."); *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (holding that while "officer may have subjectively intended to activate his blue lights solely for the safety of other vehicles on the road," reasonable person would not have felt free to leave); *State v. Langseth*, 492 N.W.2d 298, 301 (N.D. 1992) (police car that followed vehicle with flashing lights converted encounter into a stop, even if flashing lights were amber, not red); *State v. Indvik*, 382 N.W.2d 623, 627 (N.D. 1986) (stressing use of flashing red lights on police car as sign of seizure); *State v. Walp*, 672 P.2d 374 (Or. Ct. App. 1983) (holding that a reasonable person would not feel free to drive away once officer turned on emergency lights); *State v. Stroud*, 634 P.2d 316 (Wash. App. 1981) (holding that defendant "was 'seized' for Fourth Amendment purposes, at the moment the officers pulled up behind the parked vehicle and switched on the flashing light").

while "officer may have subjectively intended to activate his blue lights solely for the safety of other vehicles on the road," a reasonable person would not have felt free to leave). A reasonable person is certain to understand that when he is approached directly by a police cruiser with flashing red and blue lights, the officer is making a display of authority, not giving a safety warning. Thus, in this case a reasonable person would not have felt free to disregard Officer Bracey's unequivocal show of authority and continue to walk away.[2]

Moreover, the display of authority was not the only significant factor that would have led a reasonable person to believe that he was not free to leave. Officer Bracey's initial statements to Williams and Dourdoumis clearly indicated that "he positively suspected them of illegal activity rather than treating the encounter as 'routine' in nature." *United States v. Gray*, 883 F.2d 320, 323 (4th Cir. 1989). The record does not support the majority's assertion that Officer Bracey spoke to Williams and Dourdoumis "in a very conversational way." *Ante* at 6. To the contrary, Bracey testified that he spoke to the two men authoritatively, "like a principal was speaking to a child or *a police officer was speaking to a suspect*." (emphasis added). When Bracey asked if he could talk to Williams and Dourdoumis for a minute, the defendants

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2. The majority speculates that Williams and Dourdoumis disregarded this clear display of authority by continuing to walk down the street. *Ante* at 8. However, nothing in the record suggests that the two men saw Bracey's cruiser stop behind them, with its lights flashing, until he called out and they turned around to face him. Thus, the majority's inference that "the Defendants did not feel compelled to stop when Bracey turned on his flashing lights," *ante* at 8, is not supported by the evidence.

simply stopped and turned to face him. Bracey then told the defendants that robberies had been committed in the area, that he had been dispatched to the Burger King (where he had just seen them), that "somebody felt like the Burger King was going to be robbed," and that he "just wanted to make sure that they weren't up to no good." These circumstances do not suggest a "routine" encounter. Rather, Officer Bracey's statements suggested to the defendants that they had been placed at the scene of a specific crime in which Bracey and at least one other person suspected their involvement. Bracey further added to the impression that Williams and Dourdoumis were suspects when he disregarded Dourdoumis's explanation that they were just walking home and asked whether he could search the men for weapons. As the district court found: "This is not a situation where the police [officer was] simply questioning these defendants because he wanted to know about something somebody else was doing or something that might be happening in the area. This officer's focus was on these defendants."[3] Under these circumstances, no reasonable

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3. The majority tries to brush aside this factual finding by saying that it rests on a faulty legal premise. According to the majority, the district court's statement "seems to suggest that an encounter can never be consensual if the officer believes that the person he has stopped in fact committed a crime and the officer questions that person about his own activities." *Ante* at 8. Even assuming that the district court misunderstood the law, the majority's reasoning places the cart before the horse. Based on everything Officer Bracey said and did, the district court found that this was an encounter in which the officer had focused his attention on these particular suspects. That factual finding did not rest on any legal premise at all. The majority's quarrel is with the district court's

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person would have felt free to disregard the policeman and walk away. Rather, a person would believe that he was required to stay and dispel the officer's suspicion that he was "up to no good." *See United States v. Gonzales*, 79 F.3d 413, 420 (5th Cir. 1996) (noting that a "statement by a law enforcement officer that an individual is suspected of illegal activity is persuasive evidence that the fourth amendment has been implicated"); *United States v. Berry*, 670 F.2d 583, 597 (11th Cir. 1982) (en banc) ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention.") (footnote omitted).

Finally, the majority misreads the import of Officer Bracey's use of a "ruse" in falsely informing the defendants that a robbery was suspected at the Burger King. *Ante* at 9, n.4. As the district court found, Bracey used the ruse because it "was effective in getting individuals to consent to

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legal *conclusion* that the stop was not consensual. But an appellate court cannot disregard a district court's findings of fact just because it disagrees with that court's subsequent conclusions of law. The cases cited by the majority do not suggest otherwise. *See Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 128-30 (4th Cir. 1995) (refusing to defer to district court's finding that arbitrator was biased when district court applied wrong burden of proof for bias); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526, 1534 (4th Cir. 1984) (finding plain error in district court's conclusion that registered trademark was descriptive, not suggestive, when district court gave no weight to presumptive validity of mark and assumed incorrectly that plaintiff bore burden of proving that mark was suggestive).

searches." Specifically, Bracey testified that when he began encounters conversationally by saying "Hey, how are you doing?", people would "just turn and walk off." In other words, Bracey fabricated a story about a possible robbery because he knew that by doing so, he made the defendants feel less free to leave. *Cf. Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting) (officer's success in obtaining consent to search 786 times in a single year by asking particular question at end of traffic stop demonstrated that reasonable persons did not feel free to refuse). As the majority points out, the officer's subjective intentions do not automatically convert a consensual encounter into a Fourth Amendment seizure. *Ante* at 9 n.4. However, Officer Bracey's subjective intent is relevant to the determination of whether there was a consensual encounter "to the extent that that intent has been conveyed to the person confronted." *Michigan v. Chesternut*, 486 U.S. 567, 576 n.7 (1988). *See also United States v. Mendenhall*, 446 U.S. 544, 554 n. 6 (opinion of Stewart, J.). As the district court clearly recognized, Bracey's implication that he suspected the defendants of robbery and his statement that he wanted to make sure that they "weren't up to no good" were calculated to give the two suspects the impression that they were not free to leave. Bracey's "ruse," combined with his request to search for weapons, plainly conveyed his intent to detain Williams and Dourdoumis.

After considering all of the circumstances surrounding the encounter, I am convinced that a reasonable person would not have felt free to leave. A reasonable person would not simply disregard a police officer who directly approached him with flashing red and blue lights. A reasonable person

would not ignore the officer's accusations of specific criminal conduct. And once the officer approached, accused, and requested consent to search, a reasonable person would not feel free to disregard the police and go about his business. Here, Bracey's unmistakable display of authority, his indication through tone of voice and express statements that Williams and Dourdoumis were robbery suspects, and his clearly conveyed intent to detain the two defendants combined to create a seizure under the Fourth Amendment.

II.

I would affirm the district court's finding that the encounter between Officer Bracey and the two defendants was not consensual. Because I also agree with the district court that Officer Bracey lacked reasonable suspicion to detain the defendants, I would affirm the district court's suppression of the evidence obtained through the unconstitutional stop. I would not reach the issue of Dourdoumis's consent to a search or the justification for the subsequent search of Williams.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED AND FILED MARCH 22, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CRIMINAL ACTION NO. 2:99-cr6
CRIMINAL ACTION NO. 2:99-cr7

UNITED STATES OF AMERICA,

v.

LAWRENCE MARCEL WILLIAMS,
CASILIOS DOURDOUMIS,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motions to Suppress filed by Defendants Williams and Dourdoumis. Defendants were indicted January 20,1999 on three charges: (1) possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1); (2) possession of a stolen firearm in violation of 18 U.S.C. 922(j); and, (3) the possession of a firearm with an obliterated serial number in violation of 18 U.S.C. 922(k). These charges were brought after an investigatory stop of the defendants resulted in the discovery of weapons. Defendants now seek to suppress all evidence

gathered, including any statements made by the defendants, incident to the stop, search, seizure and arrest that occurred on October 7, 1998.

Both parties briefed the issue, and on March 16, 1999, the Court hold a hearing on the matter. The Court granted the motion to suppress and reserved its option to issue a written decision. Accordingly, this memorandum opinion and order explains and supplants the ruling from the bench.

I. FACTUAL BACKGROUND

The facts of the night in question, as developed for purposes of this motion by the testimony of Officer Bracey are as follows:

On October 7, 1998, Officer Bracey of the Virginia Beach Police Department responded to a "911 hangup" dispatch at approximately 10.50 p.m.[1] He went to the Burger King in the 500 block of Laskin Road in Virginia Beach, Virginia.

Upon arriving at the Burger King, Officer Bracey approached two employees. One was standing outside of the restaurant sweeping the front area. The other employee was also standing outside and "observing" the sweeping. Officer Bracey inquired whether a 9-1-1 call had been placed and whether they knew of the surrounding circumstances. The employees advised him that their manager had placed the

1. The dispatcher received a 9-1-1 call. The caller hung up without transmitting a message.

call, that the manager had overreacted, and that the manager had become nervous about the defendants being in the Burger King bathroom for around ten minutes, a period characterized by the employees as being "for a while." The defendants apparently had not ordered any food, but had remained around the restaurant and more specifically, in the restroom, for a while.[2] The employees specifically told the police officer that the defendants had not been doing anything. Officer Bracey did not speak with the manager. At the hearing, he stated that his failure to speak with the person who initially placed the 9-1-1 call stemmed from his concern that the defendants might leave before he could speak with them.

When the police officer approached the employees initially, he observed the two defendants also standing outside of the Burger King using a pay phone. He stated that the defendants looked at him, one of them hung up the phone, and they began walking west on Laskin Road.

After speaking with the two employees standing in front of the Burger King, Officer Bracey got into his vehicle in order to pursue the two defendants, who were on foot. He headed west on Laskin Road and caught up with the defendants at a point approximately a quarter mile beyond the restaurant.

Officer Bracey stated that he put on his grill lights and the lights in the back of his vehicle. He indicated that he did

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2. From the testimony and pleadings, the Court approximates that the individuals were in the Burger King for at least twenty minutes.

not place on his overhead lights because he did not want to create a custody situation.

As he approached the defendants on foot, he told them that he had information about robberies in the area and that he wanted to speak with them.[3] There had, in fact, been no robberies reported that night to his knowledge and he knew of no robbery suspect profiles that matched the defendants' descriptions. He admitted that he had no evidence or allegations that either defendant had committed, were committing, or were about to commit any crimes. Officer Bracey stated that he wanted to make sure that they were not "up to no good."

The officer requested permission to search the defendants. Defendant Dourdoumis dropped his leather jacket to the ground and raised his hands in the air. While raising his hands, he stated that they were "just waiting on a ride." The officer searched Dourdoumis, patted him down, and found nothing. Officer Bracey then reached down and picked up the defendant's leather jacket. At the hearing, Officer Bracey stated that the leather jacket felt unusually heavy so he felt the pockets and discovered a bulging object that he surmised was a weapon. The officer searched the jacket and uncovered a firearm.

At that point, Officer Bracey drew his own weapon and pushed Defendant Dourdoumis into Defendant Williams, who had been quietly standing aside and who had not

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3. At the hearing, Officer Bracey conceded that the statement was a "ruse."

consented in any verbal or physical manner to a search. The officer ordered both defendants to the ground in order to place them under arrest. Another officer arrived who cuffed the defendants. The officer searched Defendant Williams and found a firearm.

Subsequent to the searches, Defendant Williams allegedly made several statements about knowing that his weapon was stolen when he bought it and about the serial number being scratched off at purchase.[4]

II. DISCUSSION

In reviewing the circumstances behind the stop, search, and subsequent arrest of the defendants, the Court's concerns are focused chiefly upon the officer's initial stop of the defendants.

A. Standard

The legality of the initial stop is governed by *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. *Terry* established that the Fourth Amendment permits limited investigatory stops ("*Terry* stops") where there is some reasonable, articulable, and objective manifestation that the person seized is, or is about to be, engaged in criminal activities. *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752, 2754 (1990); *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981); *Brown v. Texas*, 443 U.S, 47, 51, 99 S.Ct. 2637,

4. It is not clear to the Court that the defendants had been apprized of their *Miranda* rights.

2640 (1979); *United States v. Brignoni-Ponce*, 442 U.S. 873, 884, 95 S.Ct. 2574, 2591 (1975); *Terry*, 392 U.S. at 16-19, 88 S.Ct. at 1877-79; *see also United States v. Taylor*, 857 F.2d 210, 213 (4th Cir. 1988). This requires that the officer's suspicion of criminal activity be based upon more than an "inchoate and unparticularized suspicion or 'hunch'." *Terry*, 392 U.S. at 27. The government must articulate a specific and objective basis for the officer's suspicion of criminal activity, so that the Court may assess the reasonableness of the suspicion and the stop independent of the officer's subjective assertions. *Cortez*, 449 U.S. at 417-418, 101 S.Ct. at 695; *United States v. Goodling*, 695 F.2d 78, 82 (4th Cir. 1982). This assessment, however, is a practical determination, dealing not with "hard certainties, but with probabilities" in order to teach a "common sense conclusion" as to whether the articulable facts reasonably raise suspicion. *Cortez*, 449 U.S. at 418.

The Court must keep in mind, however, that this suspicion, based upon the totality of the circumstances, must be a *particularized* suspicion. *Id.* That is, the specific and objective basis provided by the officers must raise the "suspicion that the *particular* individual being stopped is engaged in wrongdoing." *Id.* (emphasis added). "This demand for specificity in the information upon which police action is predicated is *the central teaching of [the Supreme Court's] Fourth Amendment jurisprudence.*" *Id.* (*citing Terry* at 21, n.18, 88 S.Ct. at 1880, n.18) (emphasis in original).

B. Analysis

The Assistant U.S. Attorney initially argued that the stop was a "police-citizen encounter." Consensual police-citizen

encounters do not amount to a seizure under the Fourth Amendment. *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3714 (U.S. 1993). Precedent defines a "police-citizen encounter" as one in which law enforcement officers approach someone in a public place in order to ask a few questions. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1853 (1993). The Fourth Amendment is not violated when law enforcement officers merely approach an individual in a public place and ask him if he is willing to answer some questions. *Florida v. Royer*, 460 U.S. 491, 497 (1983). This mere fact that a detective identifies himself as a police officer does not, without more, convert the encounter into a seizure implicating the Fourth Amendment. *Id.* at 497. To the contrary, a person approached in this way may legally disregard the questions and walk away. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In *Mendenhall*, the Court analyzed the airport encounter under a "not free to leave" test. The Court focused on whether a reasonable person would, under the circumstances of the encounter, believe that he was free to terminate the interview and leave.

To determine if an encounter is consensual, the inquiry focuses on "whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter." *Rusher*, 966 F.2d at 877.

Here, the officer's testimony revealed that his purpose was not in fact to ask questions. He sought to determine whether they were "up to no good." Officer Bracey testified that he utilized the robbery ruse as it was effective in getting

individuals to consent to searches. By his own admissions, the officer did not approach the two defendants with the intent of eliciting any verbal information. Under the *Mendenhall* test, the Court also finds that the encounter was not of a "police-citizen" nature. Officer Bracey stated that he made eye contact with the defendants at the Burger King, that he then approached them in his vehicle with lights flashing and that he communicated to them the fact that there had been several robberies in the area and that he would like to search them. A reasonable person would, under the circumstances of the encounter, not believe that he was free to terminate the interview and leave. Accordingly, the stop is properly denominated a *Terry* stop.

As a Terry stop, the issue is whether Officer Bracey had some reasonable, articulable, and objective manifestation that the defendants seized were, or were about to be, engaged in criminal activities.

Officer Bracey had been told by the Burger King employees that the defendants had not done anything and that they thought that their manager had overreacted. The officer did not question the manager to ascertain whether there was in fact a concern which should be investigated. In any case, the employees' comments suggested that the manager was concerned about loitering, not robbery. Nothing in the record suggests to the Court that any information the officer had when he left the restaurant suggested any criminal activity afoot. No crime had been committed. There had been no robberies in the area. He had no evidence that unapprehended suspects matched the description of the two defendants. He did not perceive that anyone was in any

danger at the Burger King and he in fact observed that the two employees were standing outside of the restaurant in close proximity to the defendants. The defendants did not do anything to arouse the reasonable person's suspicions once they saw the officer: they did not run, they did not make any furtive movements. They walked away.

The law requires that the officer's suspicion of criminal activity be based upon more than an "inchoate and unparticularized suspicion or 'hunch'." Not only did the government fail to articulate a specific and objective basis for the officer's suspicion of criminal activity, but the officer himself stated that he was following up a hunch and making sure that the two young men were not "up to no good." Having assessed the reasonableness of the suspicion and the stop independent of the officer's subjective assertions, the Court finds that the articulable facts do not reasonably raise suspicion under the *Cortez* standard.

Based upon the totality of the circumstances, Officer Bracey's suspicion was not *particularized*: that is, he had no specific and objective basis that raised the "suspicion that the *particular* individual[s] being stopped [were] engaged in wrongdoing."

With respect to the Defendant Williams, there is no evidence in the record that he gave consent to be searched. As there was no legal basis for the stop, the Court finds that any and all materials seized from his person were the result of an illegal and improper search under the Fourth Amendment of the United States of America. Accordingly, the motion that such materials and any other "fruit of the poisonous tree" be suppressed is **GRANTED**.

Appendix B

Some question was raised as to whether Defendant Dourdoumis consented to the search of his person and also to the search of the coat on the ground. Irrespective of his words, argued to be protestations, his actions were reasonably construed as suggesting consent. He raised his arms and extended his hands. Nonetheless, the Court finds that any reasonable person would, under the circumstances of the encounter, believe that consent was required and that he was not free to terminate the encounter, refuse the search and leave. As such, the search of his person was illegal and improper. Defendant Dourdoumis did not extend his consent to the coat on the ground. At no time during the hearing did either side argue that defendant indicated in any manner that he was consenting to the search of the coat. Moreover, the government put forth no evidence to suggest that the search of the coat was reasonable or proper. Accordingly, the motion filed by Defendant Dourdoumis that any materials seized be suppressed is **GRANTED**.

The Court believes that *United States v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997), is instructive. In *Sprinkle*, officers stopped a vehicle that contained two individuals because 1) the vehicle was parked in a high drug crime area, 2) the vehicle contained an individual known to have participated in narcotics violations in the past, 3) the officers observed the occupants of the vehicle act in a manner the policeman interpreted to be consistent with drug transactions, 4) upon sighting the officers, one individual in the car had attempted to evade identification, and 5) given the circumstances, the officers believed the driver of the vehicle was attempting to avoid scrutiny by driving away. 106 F.3d at 617. Despite the presence of these specific, articulable, and particularized

facts, the Fourth Circuit found that reasonable suspicion sufficient to justify a *Terry* stop did not exist. *Id.* at 618-619.

Given the totality of the circumstances, there seems little question that there was greater objective, particularized basis for suspicion in *Sprinkle* than in the instant case, where two young men were observed leaving a Burger King after its manager had become concerned when they spent approximately ten minutes in the restroom. Even considering the additional factor of the lateness of the hour, these factors do not amount to a reasonable, articulable suspicion that any criminal activity was, had been, or was about to be, undertaken. The government has failed to meet its burden to offer evidence supporting a finding of reasonable suspicion.

The Court finds that Officer Bracey did not objectively possess a reasonable, articulable suspicion that the particular individuals walking away from the Burger King had committed, were committing, or were about to commit a crime when he stopped them on October 7, 1998. To find otherwise is to rely solely upon the subjective assertions of the police officer, and thereby abdicate the Court's responsibility to be "ultimate enforcers of the principle" that a stop must be based upon a reasonable and articulable suspicion, and to lose the "precious right — hard earned and easily lost — to be free of arbitrary police intrusions on individual privacy and free movement." *United States v. Goodling*, 695 F.2d 78, 82, 84 (4th Cir. 1982).

Appendix B

III. CONCLUSION

Because the initial stop was improper, the subsequent frisk of the defendants and search of Defendant Dourdoumis's jacket was not lawful. The fruits of this search are therefore tainted and cannot be introduced at trial against the defendants. As the search was not justified, the subsequent statements made by the Defendant Williams are also tainted and are not admissible against the Defendant at trial. *Nardone v. United States*, 302 U.S. 379, 58 S.Ct. 275 (1939); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

For the foregoing reasons, the Court **GRANTS** Defendants' motions to suppress evidence.

The Clerk of Court is **DIRECTED** to send a copy of this Order to counsel of record for Defendants, and to the United States Attorney.

It is so **ORDERED**.

s/ Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
March 22, 1999

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-4279
CR-99-6

UNITED STATES OF AMERICA

Plaintiff – Appellant

v.

LAWRENCE MARCELL WILLIAMS

Defendant – Appellee

No. 99-4280
CR-99-7

UNITED STATES OF AMERICA

Plaintiff – Appellant

v.

VASILIOS DOURDOUMIS

Defendant – Appellee

On Petition for Rehearing En Banc

Appendix C

The appellees' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for reheaxing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK